ASIA COMMERCIAL FINANCE (M) BHD

v.

UMAS SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-87-1999]
14 OCTOBER 2000

CIVIL PROCEDURE: *Affidavits - Certificate of exhibits - Whether one certificate for each and every exhibit necessary*

CIVIL PROCEDURE: *Service - Setting aside service - Service effected out of division or residency of registry of issue - Timing for entering appearance - Rules of the High Court 1980, O. 12 r. 4(b)*

This is an application by the 2nd defendant ('Ling') to set aside the writ of summons as well as the service thereof on him.

The first objection was that two exhibits marked as LCD1 and LCD2 respectively were annexed to Ling's affidavit. The commissioner for oaths before whom Ling's affidavit was affirmed has issued a certificate in which he identifies both the exhibits as those in Ling's affidavit. Allegedly, the certificate does not comply with O. 41 r. 11(2) RHC.

As the writ was issued out of the High Court Registry at Sibu but served on Ling in Selangor, the defence's second objection was that the writ should have been endorsed with a command that Ling may enter an appearance within 20 days instead of ten days.

Held:

[1] The court should be careful that it does not construe the rules in a way that would lead to inconvenience or unreasonableness but instead interpret them to promote the general intent and purpose of the rules which is the speedy and efficient administration of justice.

[2] There is simply no necessity to read the word "any" in O. 41 r. 11(2) as meaning "each" and "every". It is unnecessary to issue one certificate for each exhibit annexed to an affidavit as it is an unnecessary waste of time and effort.

[3] In the case of a writ issued out of a High Court registry in Sarawak and Sabah, what determines whether a person is to be allowed 20 days to enter an appearance is his place of residence in relation to the situation of the registry out of which the writ is issued and not where, within Malaysia, that writ is served on a defendant.

[4] Accordingly, there is no reason to set aside the writ and service thereof. Neither the writ nor the service thereof was irregular or invalid.

[Application dismissed.]

Case(s) referred to:

Fox v. Stirk, Ricketts v. Registration Officer for the City of Cambridge [1970] 3 All ER 7 ***(refd)***

Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 ***(refd)***

Yu Oi Yong & Anor v. Ho Toong Peng & Ors [1977] 1 MLJ 121 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 12 r. 4(b), O. 41 rr. 6, 11(2)

Other source(s) referred to:

Halsbury's Laws of England, vol 16, 4th edn, para 1508

For the plaintiff - Stephen Tiong; M/s Tiong & Co

For the 2nd defendant - Anthony Ting; M/s Anthony Ting & Co

Reported by Yow Ting Fong

JUDGMENT

Clement Skinner J:

This is an application by the 2nd defendant to set aside the writ of summons as well as the service thereof on him; the 2nd defendant having entered a conditional appearance for that purpose. The grounds upon which the 2nd defendant seeks to do so are firstly, the writ of summons is invalid as it bears an endorsement that commands the 2nd defendant to enter an appearance within ten days after the service of the writ on him. It is the 2nd defendant's contention that as he is resident in West Malaysia and the writ of summons was served on him in Selangor, Darul Ehsan, the time limited for his appearance, in accordance with O. 12 r. 4(b) Rules of the High Court 1980 (hereinafter 'the RHC') is 20 days: as such, the writ should be set aside. Secondly, the purported service of the writ of summons is irregular and defective and therefore should be set aside *ex debito justitiae.*

At the commencement of the hearing, Mr. Anthony Ting of counsel for the 2nd defendant raised two preliminary objections to the affidavit affirmed on behalf of the plaintiff by one Ling Choing Diang on 16 February 2000 (hereinafter 'Ling's affidavit'). The first objection was that two exhibits marked as LCD1 and LCD2 respectively were annexed to Ling's affidavit. The commissioner for oaths before whom Ling's affidavit was affirmed has issued a certificate in which he identifies both the exhibits as those referred to in Ling's affidavit. Mr. Ting has found it fit to object to the certificate identifying these exhibits. According to him, the certificate does not comply with O. 41 r. 11(2) RHC. That rule reads:

> Any exhibit to an affidavit must be identified by a certificate of the person before whom the affidavit is sworn.

According to Mr. Ting the above rule requires that there must be one certificate per exhibit; not more than one exhibit can be identified in one certificate. Relying on *Ratnam v. Cumarasamy & Anor.* [1965] 31 MLJ 228, which states that the rules of court must *prima facie* be obeyed, counsel urged me to expunge Ling's affidavit from the record or at the least not to refer to the exhibits therein, in which event, the averments in the 2nd defendant's affidavit remain unrebutted and must be deemed to be admitted by the plaintiff. I regret I find this objection devoid of any merit. While I agree that *prima facie* the rules of court must be obeyed, it is equally important that we should understand the the rules and why they should be obeyed. In *Yu Oi Yong & Anor v. Ho Toong Peng & Ors* [1977] 1 MLJ 121, Chang Min Tat J (as he then was) said:

> It should, I think, be realised by practitioners as well as judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

In interpreting the words of O. 41 r. 11(2), I should therefore be careful that I do not put on them a construction that would lead to inconvenience or unreasonableness but instead interpret them to promote the general intent and purpose of the rules, which, as stated by Chang Min Tat J, is the speedy and efficient administration of justice. To interpret O. 41 r. 11(2) In the way Mr. Ting would have me to, would in my view, lead to inconvenience because if there were say, 50 exhibits annexed to an affidavit, the commissioner for oaths before whom the affidavit was affirmed would need to issue 50 certificates – an unnecessary waste of time and effort not only to the commissioner for oaths but also to anyone else dealing with that affidavit, including the court, having to look for 50 certificates to identify those exhibits when one certificate will serve the same purpose. In my view, there is simply no necessity to read the word "any" as meaning "each" and "every". I accordingly reject the objection raised on this ground.

Mr. Ting next objected to certain words used in para. 5 of Ling's affidavit. The objection centres around the fact that when the 1st defendant was served with the writ herein, Messrs. Anthony Ting & Co. acted on their behalf in filing their defence but when the solicitors for the plaintiff enquired from Mr. Anthony Ting if his firm would accept service of process on behalf of the 2nd defendant, Mr. Anthony Ting informed them that he had no instructions to do so. Shortly thereafter, the plaintiff's solicitors received

a telefax from the 2nd defendant informing them that he was residing in Selangor, Darul Ehsan and would accept service at the address given in the telefax. The writ was accordingly served on the 2nd defendant at Selangor, Darul Ehsan whereafter Messrs. Anthony Ting & Co. entered a conditional appearance on behalf of the 2nd defendant and thereafter made this application. In para. 5 of his affidavit, Ling has labelled the above moves by the 2nd defendant as a "dishonest tactic and strategy" deployed to achieve delay, the suggestion being that at all material times, Mr. Ting had been acting on the instructions of the 2nd defendant but deliberately not given instructions to accept service so as to delay proceedings. The 2nd defendant is offended by the allegation of dishonesty. He complains that the allegation is totally unfounded and quite baseless and, in the circumstances, scandalous. It should be struck out. Mr. Ting has affirmed an affidavit on 28 February 2000 in which he states on oath that it would have been highly presumptuous of his firm to presume that they would be instructed to act for the 2nd defendant simply because they had been appointed to act for the 1st defendant. Mr. Ting states that it was only at a later date, namely 17 January 2000, that the 2nd defendant instructed Mr. Ting to act on his behalf in this suit. From the above, it is quite plain that the imputation that the 2nd defendant had engaged in dishonesty to achieve delay is baseless and indeed, in the circumstances, scandalous and quite irrelevant in the context of this application. Pursuant to O. 41 r. 6, RHC, I order that the word "dishonest" be deleted from para. 5 of Ling's affidavit.

I now consider the merits of the 2nd defendant's application to set aside the writ and service thereof on the grounds earlier stated. The way I see it, two issues arise for consideration here: (a) Is the 2nd defendant correct in his assertion that the writ should have been endorsed with a command that he enters an appearance within 20 days and not ten days as stated; and (b), if the answer to (a) is in the affirmative, should the writ be set aside for such irregularity?

To resolve the first issue, reference must be made to O. 12 r. 4(b) which states that:

> 4. References in these rules to the time limited for appearing are references -
>
> (a) ...
>
> (b) in the case of a writ served within Sarawak or Sabah, to 10 days after service of the writ (including the day of service) or in the case of a defendant whose place of residence or if an incorporated society whose registered office of business is not within the Division or

Residency in which is situated the Registry out of which the writ of summons was issued, 20 days after service of the writ (including the day of service);

(c) ...

It will be seen from a reading of sub-r. (b) above that in the case of a writ issued out of a High Court registry in Sarawak and Sabah, what determines whether a defendant is to be allowed ten or 20 days to enter an appearance in an action is his place of residence in relation to the situation of the registry from which the writ was issued and not where, within Malaysia, that writ is served. If the place of residence of the defendant is not within the Division or Residency in which is situated the registry out of which the writ of summons was issued, then the time limited for entering an appearance is 20 days. The writ in this case was issued out of the High Court Registry at Sibu. The question is, has the 2nd defendant a place of residence within the Sibu Division?

The writ herein was issued out on 22 November 1999. The addresses of both the 1st defendant and the 2nd defendant given in the writ are 2A, 2nd Floor, Brooke Drive, 96000 Sibu, Sarawak. The plaintiff has through Ling's affidavit explained that that was the address given in the guarantee on which the 2nd defendant is now being sued and it was intended to serve the writ on him in Sibu. Though the address of the 2nd defendant stated in the writ does not appear to be his residential address in Sibu, the plaintiff has exhibited a copy of a statutory return made in Form 49 by the 1st defendant, Umas Sendirian Bhd to the Registrar of Companies, giving particulars of its directors. In that form which is dated 22 December 1999, it is stated that the 2nd defendant's residential address is 25, Upper Lanang Road, 96000 Sibu, Sarawak, which is a place within the Sibu Division.

The 2nd defendant has in an affidavit affirmed on 28 January 2000 in support of this application stated that at all material times, he was resident in West Malaysia with a residential address at 2109 Block E, Riana Green Condominium, Jalan Tropicana Utara, 47410 Tropicana, Petaling Jaya, Selangor Darul Eshan. It must be noted, however, that the 2nd defendant has not denied that he has a place of residence at 25, Upper Lanang Road, Sibu. In the light of the uncontroverted evidence contained in a public document, namely, the statutory return made in Form 49 to the Registrar of Companies, I find that the 2nd defendant did have a place of residence within the Division in which the High Court Registry at Sibu is situated and accordingly, the time limit of ten days within which the 2nd defendant was commanded to enter an appearance after service of the writ on him was correct. The writ was therefore not irregular or invalid as alleged by the 2nd defendant.

When the 2nd defendant came to know that a writ had been issued against him, he wrote to the plaintiff's solicitors informing them that he was residing in West Malaysia with an address at Selangor, Darul Ehsan and that he would be available at that address for service of the writ upon him. In response to that letter, the plaintiff's solicitors caused the writ to be so served on the 2nd defendant at that address in Selangor, Darul Ehsan. As a result of such service, It is now the contention of the 2nd defendant that the plaintiff, in having intentionally and knowingly elected to effect service on the 2nd defendant in West Malaysia, should have taken steps to amend the writ to state that the time limited for appearance was 20 days instead of the stated ten days and in not having done so, both the writ and the service thereof are irregular, invalid, defective and should be set aside. The question is, once the plaintiff became aware that the 2nd defendant was residing in West Malaysia and had decided to serve the writ on him there, was there a need to give the 2nd defendant 20 days to enter an appearance as claimed?

In my judgment, there was no need to. As I have already said, in the case of a writ issued out of a High Court registry in Sarawak and Sabah, what determines whether a person is to be allowed 20 days to enter an appearance is his place of residence in relation to the situation of the registry out of which the writ is issued and not where, within Malaysia, that writ is served on a defendant. Thus, once it is established that the 2nd defendant did have a place of residence in Sibu, he was entitled to only ten days to enter an appearance notwithstanding that the writ was served on him in Selangor, Darul Eshan. The fact that the 2nd defendant also resides in West Malaysia would not, in my view, prevent the plaintiff from relying on the fact that the 2nd defendant has a place of residence in Sibu too and therefore the plaintiff can avail itself of the provisions of O. 12 r. 4(b) and give the 2nd defendant ten days only to enter an appearance as there are authorities which show that the courts recognise that a person may have a place of residence in more than one place. See, for example, the dictum of Lord Denning MR in *Fox v. Stirk, Ricketts v. Registration Officer for the City of Cambridge* [1970] 3 All ER 7 at pp. 11, 12 where in discussing whether two students at the Universities of Bristol and Cambridge respectively were entitled to be registered on the register of electors for their university towns, since they were not resident there on a certain qualifying date, his Lordship said:

> ... a man can have two residences. He can have a flat in London and a house in the country. He is resident in both ... . I do not think these students are disqualified simply because their parental home is England. They may be resident at their homes, but they may also be resident in Bristol or Cambridge ... .

It was further contended on behalf of the 2nd defendant that in consciously electing to effect service of the writ on the 2nd defendant in Selangor, Darul Eshan, the plaintiff cannot now turn around and rely on the fact that as the ten days was the correct time limit for the 2nd defendant to enter an appearance. In support of this contention, counsel for the 2nd defendant quoted the following passage from *Halsbury's Laws of England*, vol. 16, 4th edn, at para. 1508 which reads:

> If a man is entitled to one of two inconsistent rights as opposed to having a choice between two alternative remedies, and, with full knowledge, he does an unequivocal act showing that he has chosen one, he cannot afterwards pursue the other.

My answer to this contention is that it would have merited consideration if, in the case of writ issued in Sarawak and Sabah, the place at which that writ is served determines whether a defendant is to be given ten or 20 days to enter an appearance; because then, it could be said that in deciding where to serve the writ, that decision could involve the plaintiff in having to choose between allowing a defendant ten or 20 days to enter an appearance. However, as I had been at some pains to explain earlier, in the case of a writ issued out of a High Court registry in Sarawak and Sabah, the place where that writ is served does not determine the time limited for appearing thereto – the place of residence of the defendant in relation to the registry out of which the writ is issued does. That being the case, the decision to serve the writ herein on the 2nd defendant in Selangor, Darul Ehsan did not involve the plaintiff in having to choose between two inconsistent rights as alleged.

Accordingly, there is no reason to set aside the writ and service thereof. Neither the writ nor the service thereof was irregular or invalid.

For the reasons given above, I dismiss the 2nd defendant's application with costs. Counsel for both parties had earlier informed me that the matters raised in this application have also been raised in similar applications filed in ten other suits between the same parties. Those suits are 22-88-99, 22-89-99, 22-90-99, 22-91-99, 22-92-99, 22-93-99, 22-94-99, 22-95-99, 22-96-99 and 22-99-99. Counsel for both parties had agreed in the aforementioned suits.